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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 582

ARTHUR WALTER SEED COMPANY,
A CORPORATION,
Petitioner,

vs.

KENNETH R. McCLURE, COUNTY TREASURER OF KNOX COUNTY, INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

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KENNETH R. McCLURE, COUNTY TREASURER OF KNOX COUNTY, INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

The petitioner, Arthur Walter Seed Company, a corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-entitled cause on May 2, 1957.

OPINION BELOW.

The opinion of the Supreme Court of Indiana (R. 28-41), printed in the Appendix at pages vi - xvi, is not yet reported in the official Indiana reports, but is reported unofficially in 141 N. E. (2d) 847.

JURISDICTION.

The judgment of the Supreme Court of Indiana was entered on May 2, 1957 (R. 28). A timely petition for rehearing filed on May 20, 1957 (R. 42) was denied without an opinion on June 5, 1957 (R. 47). On August 13, 1957 Associate Justice Felix Frankfurter of this Court entered an order granting an extension of time for filing this petition for writ of certiorari to and including November 2, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3) since rights, privileges and immunities are specifically set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED.

The questions presented for review are:

1. Whether the imposition of Indiana personal property taxes on goods physically located in Indiana on the assessment date, but temporarily at rest in the course of a shipment in interstate commerce, constitutes an unconstitutional burden on interstate commerce?

2. Whether the imposition of such taxes on goods so temporarily at rest in the course of an interstate shipment violates the Due Process claues of the Fourteenth Amendment to the United States Constitution for the reason that such goods have no tax situs in Indiana?

3. Whether an Illinois corporation, by qualifying to do business in Indiana and by maintaining a warehouse there in which its goods are temporarily stored in the course of a shipment in interstate commerce, thereby loses its protections under the Constitution of the United States and subjects all of its property located in Indiana, including property in interstate commerce, to Indiana property taxes?

4. Whether findings of fact made by a state court in a case involving a denial of United States constitutional rights are binding upon this Court when such findings are not supported by the record?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes which the case involves are:

1. The Commerce Clause of the Constitution of the United States (Article 1, Section 8, Clause 3).

2. The Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Title 64 of the Indiana Statutes sets forth the personal property taxes imposed by that state. (Burns: Indiana Statutes Annotated, 1951 Replacement, Volume 11, Part 2, Section 64-101 ff.)

STATEMENT OF THE CASE.

The opening sentence of the Supreme Court of Indiana's opinion correctly states that, "This case involves the question of whether seed corn in appellant's warehouse in Indiana, where it had been transported from Illinois, remained an article of interstate commerce and thus exempt from Indiana personal property tax, or whether it had acquired a taxable situs in Indiana so as to be subject to the tax." (R. 28; Appendix vi.) The case was decided on the pleadings.

The County Treasurer of Knox County, Indiana, assessed Indiana personal property taxes against the petitioner on its seed corn located in Knox County, Indiana, on the March 1 assessment dates in each of the years 1951 and 1952, and threatened to enforce collection of the same by levying upon the petitioner's personal property. The Indiana personal property tax is an *ad valorem* tax.

On July 26, 1955 the petitioner filed a Complaint (R. 5) in the Knox Circuit Court, Indiana, for an injunction restraining collection of said taxes, and for a judgment declaring that the seed corn in question was in transit in interstate commerce on the applicable assessment dates and had not then acquired a taxable situs for Indiana personal property tax purposes. The Complaint is printed in full in the Appendix at pages i-v.

Paragraph 12 of the Complaint specifically presented to the lower court the federal questions sought to be reviewed, and reads (R. 8, Appendix iv):

> "12. If defendant is permitted to enforce collection of said Indiana personal property taxes, the same will constitute a burden on interstate commerce in violation of the Constitution of the United States and will deny the plaintiff of the rights given to it by the 14th Amendment to the Constitution of the United States."

The lower court issued a temporary injunction restraining collection of the taxes (R. 11) and the County Treasurer filed a demurrer to the Complaint for want of facts (R. 11). After oral arguments addressed to the Federal constitutional issues, the lower court sustained the demurrer (R. 18) and ordered petitioner to file an amended Complaint (R. 18). When petitioner refused to plead over, the lower court dissolved the temporary injunction and rendered judgment against the petitioner (R. 19).

The Supreme Court of Indiana affirmed the judgment of the lower court and held that the demurrer had been properly sustained, thereby finally determining the litigation. The Supreme Court of Indiana is the court of last resort in that state. The Supreme Court of Indiana assumed that the Federal questions sought to be reviewed were properly raised and, in its opinion (R. 28-41; Appendix vi-xvi), considered and disposed of the same.

The Complaint filed by the petitioner in the lower court (R. 5-9; Appendix i-v) alleged that petitioner, an Illinois corporation, was authorized to do business in Indiana and owned seed corn located in Knox County, Indiana, on the applicable March 1 Indiana personal property tax assessment dates. It also alleged that this seed corn was then in transit in interstate commerce, having been shipped by petitioner from Illinois into its Indiana warehouse against orders previously received from purchasers in southern Indiana and Illinois and accepted by petitioner at its home office in Illinois. The orders provided for delivery of the seed corn to the purchasers at such places as they might designate at spring planting time, which was subsequent to March 1. Petitioner paid the cost of maintaining the Indiana warehouse and delivering the corn to the purchasers. The Complaint further alleged that the seed corn was shipped into Indiana prior to Mrach 1, and prior to the time specified for delivery in the orders, so that it would be available for delivery in an orderly fashion against such orders at spring planting time, such early shipment also being "necessary to permit an orderly distribution of the plaintiff's products in interstate commerce, otherwise unfavorable weather conditions in the spring of the year might prevent the plaintiff from delivering said corn in accordance with said Illinois contracts." All processing and bagging operations were performed on the corn in Illinois and no operations were performed on the corn in Indiana except storage until the time specified for delivery. A specific allegation was made that the corn was in interstate commerce and had not acquired a situs in Indiana for Indiana personal property tax purposes. The Complaint also alleged that the County Treasurer of Knox County, Indiana, threatened to levy upon the corn and invoked the Federal constitutional protections noted above.

REASONS FOR GRANTING THE WRIT.

1. The Supreme Court of Indiana Has Decided a Federal Question of Substance in a Way Not in Accord With the Applicable Decisions of This Court.

It is axiomatic that goods actually moving in interstate commerce are protected from the burden of state property taxation by the commerce clause of the Constitution of the United States. However, this Court has had presented to it on numerous occasions the question of whether or not a temporary interruption of the interstate transit destroys the Constitutional immunity from state property taxation. In these so-called " stoppage in transitu" cases this Court has consistently expressed and adhered to the general principle that if the shipment has begun but the goods are temporarily at rest by reason of the exigencies or conveniences of the means of transportation, considerations of the safety of the goods during transit, or natural causes over which the taxpayer has no control, the interstate movement is deemed to be continuing during the period of such interruption, and the immunity from state taxation is preserved, even though the goods are in the custody of the owner throughout the passage.

Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366, 67 L. Ed. 309, 43 S. Ct. 146.

Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469, 71 L. Ed. 359, 47 S. Ct. 170.

Carson Petroleum Co. v. *Vial*, 279 U. S. 95, 73 L. Ed. 626, 49 S. Ct. 292.

Conversely, where the interruption in the interstate journey occurs for purposes connected with the business convenience or profit of the owner of the goods, such as to permit the owner to perform some kind of sales or processing activity, then this Court has found that the transaction amounts to two shipments in interstate com-

merce and has sustained the state tax assessed in the interval between them.

Minnesota v. *Blasius*, 290 U. S. 1, 78 L. Ed. 131, 54 S. Ct. 34.

Bacon v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615, 33 S. Ct. 299.

General Oil Co. v. *Crain*, 209 U. S. 211, 52 L. Ed. 754, 28 S. Ct. 475.

These two lines of "stoppage in transitu" cases relate to attempted state *ad valorem* property taxation of goods shipped among the states, and are to be distinguished from the cases dealing with state taxation of the receipts from and instrumentalities of interstate commerce. When the state property tax is denied, this Court has determined that the tax imposes an improper burden on interstate commerce in violation of Article I, Section 8, of the United States Constitution. The tax also fails by reason of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, because it attempts to reach goods which have no tax situs within the state.

The general rule is that once the transportation of goods has acquired an interstate character, it continues until the goods reach the point where the parties originally intended the movement should finally end. Thus, when the transportation is temporarily interrupted in the course of an interstate journey the reasons for the stoppage must be considered and are determinative of the question of the immunity from state taxation. "If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken" (*Champlain Realty Co.* v. *Brattleboro*, *supra*, 260 U. S. at 373), and the state tax is unconstitutional for the reason that the goods are still in interstate commerce, not having reached the point where the parties intended. If, however, the interruption is for the sole business purpose of the shipper, to permit him to

sell, process, separate, redistribute, or otherwise exercise proprietary rights over the goods, the state tax is upheld for the reason that the stoppage is not in furtherance of the intended transportation and the interstate character of the shipment is lost.

This case is in the first category of "stoppage in transitu" cases, where the immunity from state taxation is preserved because the interruption of the shipment occurred only for the purpose of promoting the safe and convenient transit of the goods. The allegations of the Complaint and the reasonable inferences therefrom must be taken as proved since this case comes up on a sustained demurrer.

The Complaint alleges that the shipment of the seed corn had been made from Illinos to Indiana against orders previously received and accepted by petitioner at its home office in Illinois for delivery at such places as the Illinois and Indiana purchasers might designate (Complaint, Par. 5; R. 6; Appendix ii). It must therefore be accepted as a fact that the seed corn in question had been specifically appropriated to these orders, and that the interstate shipment had begun.

The Complaint further alleges that shipment was made prior to the delivery dates in the orders so that the corn would be available for delivery in an orderly fashion against the orders at spring planting time, and that the early shipment was "necessary to permit an orderly distribution of the (petitioner's) products in interstate commerce, otherwise unfavorable weather conditions in the spring of the year might prevent the (petitioner) from delivering said corn in accordance with said Illinois contracts." (Complaint, Pars. 7 and 8; R. 7; Appendix ii-iii.) It must therefore be accepted as a fact that the interruption of the shipment in interstate commerce was occasioned by reasons relating to the safe or convenient transit, or to natural causes over which the petitioner had no control.

The Complaint also recites that all processing and bag-

ging operations were performed on the corn by the petitioner in Illinois prior to shipment, and after receipt of the corn in the Indiana warehouse, the corn was merely stored until the time specified for delivery, and that petitioner performed no other operations thereon (Complaint, Par. 9; R. 7; Appendix iii). It must therefore be accepted as a fact that the interruption of the shipment in interstate commerce did not occur for the business purpose of the petitioner, nor did the petitioner exercise any proprietary rights over the corn except to retain custody thereof in its warehouse during the period of stoppage in transitu.

The Supreme Court of Indiana based its decision in this case largely upon the holding of this Court in *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377, which involved the constitutionality of the Illinois Retailers' Occupation Tax as applied to receipts from all sales made to Illinois purchasers by the taxpayer. In the *Norton* case this Court held that sales resulting from orders sent directly to Massachusetts by Illinois customers, and shipped from Massachusetts directly to the customer, were in interstate commerce and not subject to the Illinois tax.

The Norton Co., a Massachusetts corporation authorized to do business in Illinois, maintained a retail outlet and warehouse in Illinois from which it made local sales. From this outlet the taxpayer also took orders from Illinois customers and forwarded them to its home office in Massachusetts. The local Illinois office also received carload lot shipments from Massachusetts, which it broke down and reconsigned to customers in the component individual packages that made up the carload lot. This Court held that, while the taxpayer might have avoided the Illinois tax on some of these transactions by showing that they were dissociated from the local business and interstate in nature, the taxpayer had failed to discharge its burden of proof in that respect. The Illinois court had determined that the pres-

ence of the local retail outlet in Illinois, and the functions it performed, justified attributing all income from Illinois sales to that outlet. This Court recognized that a concern does not, by engaging in business within a state, lose its right to do interstate business with tax immunity. However, it was held that there was substantial evidence in the record to support the findings of the Illinois court, and the Illinois tax was permitted to apply to all Illinois sales, except those which were clearly in interstate commerce and which had no association with the Illinois outlet.

In this case the Indiana Supreme Court improperly decided that the holding of the *Norton* case was controlling and found that the petitioner's Indiana warehouse was operated in a fashion similar to the Norton Co.'s Illinois retail outlet. There is nothing in the record to support such a finding and it must be rejected by this Court.

There are important distinctions between this case and the *Norton* case. In this case there is no evidence that the existence of the petitioner's Indiana warehouse had any effect whatsoever on its Indiana market, the case being submitted on the pleadings and the allegations of the Complaint being admitted by the demurrer. The only corn which Indiana is attempting to tax is that which the Complaint shows was shipped in interstate commerce. The allegations of the Complaint establish a prima facie case that the Indiana personal property tax, when applied to the petitioner's seed corn, constitutes an unconstitutional burden on interstate commerce. In the *Norton* case the Illinois court's finding that the sales subject to tax were not in interstate commerce was supported by evidence of the taxpayer's sales and service activities from its local Illinois outlet, and the taxpayer failed to establish its right to the constitutional protections which it was claiming.

On the basis of the foregoing, it is submitted that the decision of the Supreme Court of Indiana is erroneous and

contrary to prior decisions of this Court in a field where the states, in their quests for revenues, have traditionally followed an aggressive policy of attempting to tax interstate commerce, and to deny rights, privileges and immunities guaranteed by the United States Constitution. If permitted to stand, the judgment will encourage Indiana and other states to seek additional revenues by imposing unconstitutional taxes on goods in transit in interstate commerce.

2. Under the Guise of Fact Findings, Not Supported by the Record and Not Binding on This Court, the Supreme Court of Indiana Has Erroneously Denied Petitioner of Rights, Privileges and Immunities Guaranteed by the Constitution of the United States.

In this case the Supreme Court of Indiana improperly and without support in the record found or assumed the existence of certain facts, on the basis of which it concluded that the goods were no longer in interstate commerce and that the constitutional immunity from state taxation was destroyed.

These unsupported findings include the statement in the opinion that the petitioner "is obviously engaged in running a warehouse in Indiana under consent procured from the state with all the flexibility of movement and discretion required to enhance the further sale of its products and to compete with local business. The protection afforded shipments in interstate commerce does not contemplate or envision the warehouse activity engaged in by (petitioner)." (R. 38, Appendix xiv.) No facts are alleged in the Complaint which directly or by inference support this finding that petitioner was engaging in local sales activity from its Indiana warehouse. To the contrary, as previously shown, the allegations in Paragraphs 5 and 9 of the Complaint (R. 6, 7; Appendix ii, iii) require the conclusions that all of the seed corn in question was in dead storage at

the Indiana warehouse, that no sales or processing operations were performed thereon in Indiana, and that petitioner never diverted the corn from the interstate contracts against which it was shipped.

The effect of these allegations is to negate the existence of any local sales activity or competition with local business, and to refute the Supreme Court of Indiana's further findings in the opinion that petitioner was engaged "in a warehouse business for his personal profit and benefit," that the Indiana warehouse became "an entrepot or depot for the redistribution of (petitioner's) product," and that the interruption of transit was intended "to enable (petitioner) to compete on a local basis to its personal advantage." (R. 39, Appendix xiv-xv.)

A further unsupported finding in the opinion is to the effect that "the right of subsequent diversion of previous interstate orders to new customers at (petitioner's) discretion gives (petitioner's) warehouse the attributes of a local business." (R. 39, Appendix xiv.) Earlier in the opinion (R. 37, Appendix xiii) the Supreme Court of Indiana refers to petitioner's concession that it had the "power" to divert the corn from the orders against which it was originally shipped. This "power" existed for the obvious reason that at all times prior to delivery the petitioner had physical possession of the corn. An exercise of the "power" to divert would result in a breach of contract by petitioner and would give rise to its correlative "liability" to the customers against whose orders the corn had been specifically appropriated and shipped in interstate commerce. The petitioner had a "duty" to deliver the corn against those orders. The Supreme Court of Indiana, without basis in fact or theory, transformed this "power" to divert into a "right" to divert with impunity and held that it gave the petitioner's warehouse the attributes of a local business. In law and in fact, the petitioner had only a naked "power" to divert.

Nothing in the record shows that any such diversion occurred and, as stated in *Hughes Bros. Timber Co.* v. *Minnesota, supra*, 272 U. S. at 476: "The mere *power* of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun * * *.".

Also in the opinion the Supreme Court of Indiana, by taking judicial notice of the recommended time for planting of corn in southern Indiana in the spring, concluded that since the corn in question would be in the petitioner's Indiana warehouse for a period in excess of 60 days, the petitioner was engaged in a local business (R. 38, Appendix xiv). This conclusion is negated by the allegations in the Complaint that the early shipment was necessary to permit an orderly distribution of the petitioner's products in interstate commerce (Pars. 7 and 8; R. 7; Appendix ii-iii). Whether or not the allegation is provable, and whether the corn was in Indiana for 60 days or for six months prior to the delivery date to the customers were not properly before or decided by the Supreme Court of Indiana since the demurrer admitted that the early shipment (and the consequent interruption of transit) was "necessary" for the distribution of the products in interstate commerce.

This Court has consistently recognized that it is not bound by facts found by a state court in cases involving a denial of asserted Federal constitutional rights, privileges or immunities, particularly when facts have been admitted by demurrer. In such circumstances this Court will analyze the facts alleged and draw its own inferences as to their ultimate effect. Otherwise it would be within the power of the state court to prevent review of constitutional questions by making unsupported findings of fact.

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124.

Postal Telegraph v. *Newport*, 247 U. S. 464, 62 L. Ed. 1215, 38 S. Ct. 566.

Brown v. *Western Ry.*, 338 U. S. 294, 94 L. Ed. 100, 70 S. Ct. 105.

If the judgment of the Supreme Court of Indiana is permitted to stand in this case, it will encourage the state courts to continue to deprive litigants of federal rights, privileges and immunities and to preclude review thereof by making factual determinations which have no support in the record.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES J. COSTELLO, JR.,
Counsel for Petitioner.

K. RAYMOND CLARK,
Of Counsel.

October 28, 1957.

APPENDIX.

COMPLAINT FILED IN LOWER COURT.

STATE OF INDIANA, } ss.
COUNTY OF KNOX. }

IN THE KNOX CIRCUIT COURT

In Vacation, Following May Term, 1955.

ARTHUR WALTER SEED COMPANY, a corporation,
Plaintiff,
vs.
KENNETH R. McCLURE, County Treasurer of Knox County, Indiana,
Defendant.
} No. 25879.

COMPLAINT.

The plaintiff, Arthur Walter Seed Company, complains of the defendant, Kenneth R. McClure, County Treasurer of Knox County, Indiana, and for cause of action says:

1. The plaintiff, Arthur Walter Seed Company, is a corporation duly organized and existing under the laws of the State of Illinois and having its principal office in the City of Grand Ridge, Illinois. Plaintiff has qualified to do business in the State of Indiana.

2. The defendant is the duly elected, qualified and acting treasurer of Knox County, Indiana.

3. There was listed and assessed in plaintiff's name in the records and on the tax duplicate of said Knox County,

Indiana, for the years 1951 and 1952 personal property purported to consist of seed corn, and the defendant is seeking to collect from the plaintiff by reason thereof the sum of $1,744.29, being Indiana personal property taxes alleged to be due from plaintiff on said seed corn for said years of $1,482.40, together with a penalty of $261.89.

4. Said seed corn so assessed was owned by the plaintiff and was located in Knox County, Indiana on March 1 of each of the years 1951 and 1952, but said seed corn was in transit in interstate commerce on each of said dates.

5. Said seed corn was shipped into Indiana by the plaintiff from Illinois prior to March 1 in each of the years 1951 and 1952 against orders previously received from purchasers located in southern Indiana and Illinois and accepted by the plaintiff at its offices in Grand Ridge, Illinois, which said orders provided for delivery of said corn by the plaintiff to said purchasers at such places as said purchasers might designate, at spring planting time, which was subsequent to March 1 in each of the years 1951 and 1952.

6. Said corn was shipped from Illinois and consigned to the plaintiff at its warehouse in Knox County, Indiana, and title to said corn remained in the plaintiff until delivery to the purchasers subsequent to March 1 in each of said years, the plaintiff paying the cost of maintaining said warehouse and of delivering said corn to such Indiana purchasers. Delivery of said corn by the plaintiff from Illinois to its Knox County, Indiana warehouse did not constitute delivery of the same to said purchasers under the aforesaid orders received and accepted by the plaintiff in Illinois.

7. Said seed corn was shipped by the plaintiff from Illinois to its Knox County, Indiana warehouse in each of said years of 1951 and 1952 prior to March 1 and prior to

the time specified for delivery in the aforesaid orders from various purchasers so that the same would be available for delivery in an orderly fashion against such orders at spring planting time.

8. The shipment of said seed corn by the plaintiff to its Knox County, Indiana warehouse in each of the years 1951 and 1952 in advance of the delivery date (spring planting time) specified in its Illinois contracts with said purchasers was necessary to permit an orderly distribution of the plaintiff's products in interstate commerce, otherwise unfavorable weather conditions in the spring of the year might prevent the plaintiff from delivering said corn in accordance with said Illinois contracts.

9. All processing and bagging operations on said seed corn were performed by the plaintiff in Illinois prior to shipment of the same to Indiana. After receipt of said corn in its Knox County, Indiana warehouse the plaintiff merely stored the same until the time specified for delivery thereof to said purchasers subsequent to March 1 and performed no other operations thereon.

10. On March 1 of each of the years 1951 and 1952 all of said seed corn was in transit in interstate commerce and had not acquired a situs in Indiana for Indiana personal property tax purposes.

11. The defendant has served upon the plaintiff a "Demand Notice" dated June 28, 1955 in which said defendant demanded payment by the plaintiff of said personal property tax, penalty and costs in the total amount of $1,744.29 and stated that if the same is not paid within thirty days, the personal property of the plaintiff will be subject to sale for payment of such tax. Said defendant as such treasurer is threatening to, and will unless restrained from so doing, enforce the collection of said taxes by levying upon and selling personal property of the plaintiff located

in Knox County, Indiana, to the great damage and irreparable injury of the plaintiff.

12. If defendant is permitted to enforce collection of said Indiana personal property taxes, the same will constitute a burden on interstate commerce in violation of the Constitution of the United States and will deny the plaintiff of the rights given it by the 14th Amendment to the Constitution of the United States.

13. This is a suit for a declaratory judgment and for further relief under the "Uniform Declaratory Judgments Act" of Indiana (Acts 1927, Ch. 81).

WHEREFORE plaintiff prays:

I. For an injunction restraining defendant, and his successors, from the enforcement of collection of said personal property taxes and penalty.

II. That the Court enter a judgment declaring that said seed corn belonging to the plaintiff was in interstate commerce and had not acquired a taxable situs for Indiana personal property tax purposes on March 1 of each of the years 1951 and 1952.

III. That the Court grant such other and further relief as may be necessary in the premises.

ARTHUR WALTER SEED COMPANY,
Plaintiff,
By: /s/ ARTHUR WALTER,
Pres.

STATE OF ILLINOIS,
COUNTY OF LASALLE. } ss.

Arthur Walter, being duly sworn, says that he is President of Arthur Walter Seed Company, plaintiff herein, and that the facts hereinabove set forth are true.

/s/ ARTHUR WALTER.

Subscribed and sworn to before me this 23 day of July, 1955.

/s/ JOHN E. GEIGER,
Notary Public.

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OPINION OF THE SUPREME COURT OF INDIANA.

IN THE SUPREME COURT OF INDIANA.

Arthur Walter Seed Company, a Corporation,
Appellant,
vs.
Kenneth R. McClure, County Treasurer of Knox County, Indiana,
Appellee.
} No. 29,392.

APPEAL FROM THE KNOX CIRCUIT COURT.

Honorable Ralph A. Seal, Judge.

LANDIS, *J.*

This case involves the question of whether seed corn stored in appellant's warehouse in Indiana, where it had been transported from Illinois, remained an article of interstate commerce[1] and thus exempt from Indiana personal property tax, or whether it had acquired a taxable situs in Indiana so as to be subject to the tax.

According to appellant's complaint it is an Illinois Corporation having its principal office in Grand Ridge, Illinois, and is admitted to do business in Indiana. That prior to March 1, in each of the years 1951 and 1952, appellant shipped seed corn from Illinois into Indiana against orders previously received and accepted from purchasers in Illinois and Indiana. The orders provided for delivery of the

NOTE 1. Article 1, § 8, cl. 3 of the U. S. Constitution known as the "Commerce Clause" precludes a state from taking any action impeding the free flow of trade among the states. *Freeman* v. *Hewit* (1947), 329 U. S. 249, 67 Sup. Ct. 274, 91 L. ed. 265.

corn by appellant to the purchasers, at places designated by the purchasers, at spring planting time.

The corn was consigned to appellant at its warehouse in Knox County, Indiana, and title thereto remained in appellant until delivery to purchasers subsequent to March 1, with appellant paying cost of maintaining warehouse and delivering corn to the purchasers.

All processing and bagging operations on the corn were performed by appellant in Illinois, and after its receipt in Knox County, Indiana, it was merely stored until the time specified for delivery to purchasers.

Appellant alleges the shipment of the corn to the Knox County warehouse in advance of the delivery date was necessary for an orderly distribution in interstate commerce, allegedly because of uncertainties in weather conditions.

Appellant further alleges the corn on March 1 of each year was in interstate commerce and had not acquired a situs in Indiana for Indiana property tax purposes. Appellant asks for a declaratory judgment in its favor and an injunction restraining appellee from collecting the tax.

Appellee county treasurer filed demurrer to the complaint for want of facts, contending that under the facts alleged interstate commerce was at an end and said shipment was taxable by Indiana. The demurrer was sustained and appellant appeals from the judgment for appellee rendered on appellant's refusal to plead over.

The first case cited by appellant in support of its contention that the shipment in the case before us remained in interstate commerce despite its temporary interruption is *Champlain Realty Co.* v. *Brattleboro* (1922), 260 U. S. 366, 43 S. Ct. 146, 67 L. ed. 309, 25 A. L. R. 1195. In that case the state of Vermont attempted to tax logs cut in Vermont and being floated down a stream in that state for delivery

in New Hampshire. The logs were under the control of the owner at all times and had been stopped on the assessment date by a boom at the mouth of a river to prevent them from entering a joining river in which the water was too high for safe transit. The Supreme Court distinguished the facts from the case of *Coe* v. *Errol* (1886), 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715, and upheld the immunity of the logs from local state taxation while the owner had the logs detained by the boom and said at pp. 373, 374, 376 of 260 U. S.:

> "[The boom] was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood * * * [in New Hampshire], on their final journey already begun. The logs were not detained to be classified, measured, counted, or in any way dealt with by the owner for his benefit, except to save them from destruction in the course of their journey, that, but for natural causes, over which he could exercise no control, would have been actually continuous.
>
> * * * * *
>
> The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. * * * interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual

continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied."

The next case relied on by appellant is *Hughes Bros. Timber Co.* v. *Minnesota* (1926), 272 U. S. 469, 47 S. Ct. 170, 71 L. ed. 359, in which Minnesota attempted to collect personal property tax from the seller of logs placed on the ice and banks of Swamp river for shipment to Michigan. The tax was assessed May 1, and several days prior thereto the ice from the river had broken and the logs were proceeding downstream. Eighteen days later the logs reached the boom on Lake Superior where the logs were to be loaded as promptly as possible on vessels of the buyer for shipment across the lake to Muskegon, Michigan. The court held the logs to be in interstate commerce, and at pp. 475, 476 of 272 U. S. stated:

"The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. *It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the Champlain Co. Case.* The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as is in *Champlain Co.* Case.

Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp river without a breach of contract made by him with his vendee, who by the agreement of sale divided with him the responsibility for the continuous interstate transportation." (Emphasis supplied.)

Appellant cites the case of *Carson Petroleum Co.* v. *Vial* (1929), 279 U. S. 95, 49 S. Ct. 292, 73 L. ed. 626, in which oil was shipped from another state into Louisiana and placed in storage tanks to await transportation facilities for export. The shipper always had orders on hand in excess of the quantity of oil in Louisiana. Delivery of the oil so sold was accomplished by loading aboard ship and prior to such delivery, the risk of loss remained with the shipper. The court held the oil to be in interstate commerce and not subject to Louisiana tax while in storage awaiting further transportation facilities for export. It distinguished the case of *General Oil Co.* v. *Crain* (1908), 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754, which had held oil shipments into Tennessee where the oil was separated into separate containers before further shipment outside the state, were subject to Tennessee tax as the redistribution of the oil at Memphis was a rest interrupting the journey and the tanks there were an assembling entrepot. The court mentions the artificial rearrangement of tanks in a large entrepot for redistribution of oil to avoid previous taxability.

A case very close to the case at bar is the recent decision of *Norton Co.* v. *Department of Rev.* (1951), 340 U. S. 534, 71 S. Ct. 377, 95 L. ed. 517, in which the Norton Company, a Massachusetts corporation under consent from the state of Illinois to do business therein, operated a branch office and warehouse in Chicago. The Chicago branch sold goods in stock over-the-counter to cash customers and those whose

credit the home office had approved. It also received orders for items not in stock and special equipment, which orders were forwarded to the Massachusetts office for acceptance. The Massachusetts office packaged and marked each customer's goods and accumulated them until a carload lot could be consigned to the Chicago office and warehouse. At Chicago the carload was broken and the separate items ordered were reconsigned to customers in their original packages. Referring to the activity of the Chicago business situs, the U. S. Supreme Court stated at p. 536 of 340 U. S. as follows:

> "The Chicago office thus intervenes between vendor and Illinois vendees and performs service helpful to petitioner's competition for that trade in all Illinois sales except when the buyer orders directly from Worcester, [Massachusetts] and the goods are shipped from there directly to the buyer.
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> "* * * *when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation* * * * *only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.* [Emphasis supplied.]
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> "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce * * *. But, from a competitive point of view, that system has disadvantages. The trade may view the seller as remote and inaccessible. He cannot be reached with process of local courts for breach of contract, or for service if the goods are defective or in need of replacement. Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the

> State, to keep close to the trade, to supply locally many items and take orders for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384, 79 L. ed. 934, 55 S. Ct. 477, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

Appellant has cited the case of *Binderup* v. *Pathe Exchange* (1923), 263 U. S. 291, 44 S. Ct. 96, 68 L. ed. 308, which held the anti-trust laws applicable to interstate commerce applied to New York manufacturers of motion picture films who had leased the same to Nebraska exhibitors. The films were shipped by the New York manufacturers to their Nebraska agents for delivery to the Nebraska lessees. While conceding the factual situation in the cited case is somewhat comparable to that in the case at bar, it is not believed the anti-trust cases are particularly helpful in determining the power of the states to impose a non-discriminatory tax on property which, although connected with the flow of interstate commerce, has come to rest and acquired a situs within the state.

See *Minnesota* v. *Blasius* (1933), 290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131, citing *Swift* v. *United States* (1905), 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518; and *Stafford* v. *Wallace* (1922), 258 U. S. 495, 525, 526, 42 S. Ct. 297, 66 L. ed. 735, 745, 746, 23 A. L. R. 229.

The court in *Minnesota* v. *Blasius* (1933), *supra*, at pp. 9, 10 of 290 U. S. said:

> "* * * the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit

in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation.

* * * * *

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment, elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

The case of *Gross Income Tax Div.* v. *Surface Comb. Corp.* (1953), 232 Ind. 100, 111 N. E. 2d 50, cited by appellant, is not applicable here, for that was a tax on receipts from interstate commerce.

To recapitulate the facts in the case before us, appellant, an Illinois corporation under consent from the state of Indiana to do business here, operated a warehouse in Knox County, Indiana. The seed corn was shipped by appellant from Illinois to its Indiana warehouse consigned to itself and arrived at the warehouse prior to March 1. Title remained in itself until delivery to the purchasers at *spring planting time.* Although the corn was shipped pursuant to orders received at the home office from purchasers, appellant concedes that "the fair inference from [the complaint] is that appellant retained the power to divert the corn from the orders against which it was originally shipped in interstate commerce."

Our courts take judicial notice of the seasons for the planting and harvesting of crops within their own jurisdic-

tion, including facts of common knowledge concerning the time for the sowing or planting of such crops.[2]

In this connection we should note that it is a matter of common knowledge and understanding among persons engaged in agriculture that the recommended time for the planting of corn in southern Indiana [which area includes Knox County, Indiana] is approximately from May 10 to May 20.[3]

As the seed corn in question in this case admittedly was to remain in the appellant's warehouse from a date prior to March 1 until spring planting time, it follows that such corn necessarily was therein stored for a period in excess of 60 days during which time appellant could divert the shipment to other purchasers as he pleased.

Appellant is obviously engaged in running a warehouse in Indiana under consent procured from the state with all the flexibility of movement and discretion required to enhance the further sale of its product and to compete with local business. The protection afforded shipments in interstate commerce does not contemplate or envision the warehouse activity engaged in by appellant. The commerce clause does not extend to articles previously in interstate commerce but which are placed in the shipper's warehouse far in advance of the date of pretended delivery, so as to permit the shipper, without local tax liability, to engage in a warehouse business for his personal profit and benefit. The right of subsequent diversion of previous interstate orders to new customers at appellant's discretion gives appellant's warehouse the attributes of a local business.

NOTE 2. 31 C. J. S. Evidence, § 29b, p. 557, 558; 20 Am. Jur., Evidence, § 76, p. 96, 97; *Abel* v. *Alexander et al.* (1874), 45 Ind. 523, 528, 15 Am. Rep. 270; *Ross* v. *Boswell* (1877), 60 Ind. 235; *Poke* v. *Peerless Fdry. Co.* (1954), 124 Ind. App. 544, 119 N. E. 2d 905.

NOTE 3. Purdue University, Agri. Exten. Service, Entomology Dept., Mimeo E-17, April 1953, Rev. April 1955.

Under such circumstances appellant's warehouse becomes an entrepôt or depot for the redistribution of appellant's product as mentioned in the Coe[4] and Crain[5] cases. The interruption of transit was not reasonably intended for the furtherance of orderly interstate commerce, but rather to enable appellant to compete on a local basis to its personal advantage.

As stated in the *Norton* case, *supra*, at p. 537 of 340 U. S.:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation * * * only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption."

In our opinion appellant has not in any wise discharged that burden.

Appellant has made a procedural contention that the allegations of its complaint containing such conclusions as that the goods were "in transit in interstate commerce" are necessarily admitted by appellee's demurrer filed thereto. However, the specific allegations of the complaint set out in detail the particular circumstances of the shipment here in question, including the date of shipment to the warehouse, appellant's ownership and control over the goods, the time of contemplated delivery to the purchasers, appellant's warehouse activity and its submission to the state of Indiana for the purpose of doing business in the state. It is our opinion that such allegations prevail over the general allegations, for it is a general rule that specific averments

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NOTE 4. *Coe* v. *Errol* (1886), 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715.

NOTE 5. *General Oil Co.* v. *Crain* (1908), 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754.

in a pleading must be given precedence over general averments regarding the same matter. Or, in other words, if the pleader goes beyond the general allegations of a complaint and sets forth the specific facts which he claims constitute the situation which entitles him to recover, the specific averments may overbear the general and render the pleading vulnerable to demurrer.[6]

From the foregoing discussion it is necessarily our conclusion that the seed corn here in controversy was no longer in interstate commerce, but had acquired a taxable situs in Indiana for purposes of personal property tax, and that the demurrer was properly sustained to appellant's complaint.

Judgment affirmed.

ACHOR, *C. J.*, and BOBBITT and EMMERT, *JJ.*, concur.
ARTERBURN, *J.*, not participating.

NOTE 6. See: *Schidler* v. *Merchants Trust Co.* (1950), 228 Ind. 594, 602, 94 N. E. 2d 665; 41 Am. Jur., Pleading, § 33, p. 312, 71 C. J. S., Pleading, § 56, p. 143.